(2)

No. 95-8

Supreme Court, U.S.
FILED
JUL 31 1995
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

SICOR LIMITED, ALCO CHEMICALS LTD.,
Petitioner,

VS.

CETUS CORPORATION;
CETUS GENERIC CORPORATION;
BEN VENUE LABORATORIES, INC.;
BEN VENUE GENERIC CORPORATION;
and CETUS-BEN VENUE THERAPEUTICS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES B. COHLER
c/o Lasky, Haas & Cohler, P.C.
505 Sansome Street, 12th Fl.
San Francisco, CA 94111
(415) 788-2700
Counsel for Respondents

July 31, 1995

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 393-2300

BEST AVAILABLE COPY

28 pp

QUESTIONS PRESENTED

In accordance with Rule 15.1 of the Rules of this Court, we show below that none of the questions stated in the Petition is presented on this record. Each of the questions presupposes that Petitioners were (or at least one of them was) manufacturing competitors at the relevant time. As both the district court and court of appeals found, neither was.

LIST OF PARTIES

Petitioners accurately list the parties of record in the court of appeals, but incompletely respond to Rule 29.1 of the Rules of this Court.

Petitioner Sicor Limited has forfeited its charter in the United Kingdom. Sicor, S.p.A. is its successor in interest.

As the court of appeals accurately noted (App. 4a n.1), Respondent Cetus Corporation, formerly a publicly traded corporation, was acquired by Chiron Corporation through a merger effective December 12, 1991, and subsequently changed its name to Cetus Oncology Corporation on March 6, 1992. As of December 12, 1991, Cetus Corporation was, and Cetus Oncology Corporation currently is, a wholly owned subsidiary of Chiron Corporation. Chiron Corporation is a publicly traded corporation. Approximately 49.5 percent of its shares are held by Ciba-Geigy Limited, directly or through its wholly owned subsidiaries. Subsidiaries which are not wholly owned by Chiron Corporation (excluding officer or director qualifying shares) are: Chiron Technolas Opthalmologics Systeme GmbH, Ciba Corning Diagnostics de Mexico S.A. de C.V., Domilens S.A. (Sweden), and Cetus-Ben Venue Therapeutics. Chiron Corporation has announced the pending acquisition of all of the outstanding shares of Viagene, Inc., subject to requisite governmental and other approvals. Other affiliates which have issued shares to the public are Cetus Healthcare Limited Partnership I and Cetus Healthcare Limited Partnership II.

Cetus Generic Corporation is a wholly owned subsidiary of Cetus Oncology Corporation.

Ben Venue Laboratories, Inc. has no publicly traded parent subsidiary, or affiliated corporations.

Ben Venue Generic Corporation is a wholly owned subsidiary of Ben Venue Laboratories, Inc.

Cetus-Ben Venue Therapeutics is a partnership between Cetus Generic Corporation and Ben Venue Generic Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
I. THE PERTINENT FACTUAL BACKGROUND	2
A. *Respondent CBVT's* Initial Entry into the United States Generic Doxorubicin Market by Obtaining Bulk Doxorubicin from Petitioners	2
B. The Shutdown of the Manufacturing Plant Which Was the Source for Petitioners' Supply of Doxorubicin to CBVT	3
C. Neither of the Petitioners Was the Manufacturer of the Bulk Doxorubicin Which Respondents Had Agreed To Purchase from Petitioners	4
II. THE INTERLOCUTORY POSTURE OF THE CASE	6
SUMMARY OF ARGUMENT	7
1. None of the questions purportedly presented arises on the present record	7
2. Even if the questions stated were presented, none would warrant grant of the writ	7
3. The questions purportedly presented may well be rendered moot by further proceedings after remand to the district court; the interlocutory posture of the case is further reason not to grant the writ	9

TABLE OF CONTENTS

	Page
ARGUMENT	9
I. THE QUESTIONS PURPORTEDLY TENDERED IN THE PETITION ARE NOT PRESENTED ON THIS RECORD	9
A. Petitioners Were Not Manufacturer-Competitors because Sicor, S.p.A.'s Plant Was Shut Down during the Entirety of the Relevant Time Period	9
B. The Court of Appeals' Reference to "Making Money" Negated Any Inference of Predatory Pricing at a Short-Term Loss, and Petitioners Err in Implying that the Court of Appeals Meant To Establish a Safe Harbor Precluding Antitrust Liability	11
II. THERE IS A HIGH LIKELIHOOD THAT THE QUESTIONS PURPORTEDLY PRESENTED WILL, IN ANY EVENT, BE RENDERED MOOT UPON REMAND TO THE DISTRICT COURT	12
III. WHEN PETITIONERS WERE UNABLE TO PERFORM THEIR SUPPLY AGREEMENT, IT WAS PRO-COMPETITIVE FOR RESPONDENTS TO MAKE ALTERNATIVE SUPPLY ARRANGEMENTS IN ORDER TO CONTINUE THEIR ENTRY INTO THE MARKET	13
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

Page

American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224 (9th Cir. 1988) 12

Banco do Brasil, S.A. v. Latian, Inc., 234 C.A.3d 973 (1991), *cert. denied*, 504 U.S. 986 (1992) 12

Brotherhood of L. F. & E. v. Bangor & A. R. C., 389 U.S. 327 (1967) 12

Chicago Board of Trade v. United States, 246 U.S. 231 (1918) 13, 14

Dictograph Products v. Federal Trade Comm'n, 217 F.2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955) 18, 19

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 2

Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U.S. 271 (1949) 2

Illinois Corporate Travel v. American Airlines, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) 15

NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984) 2, 14

Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369 (10th Cir. 1979) 16, 17

SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3rd Cir.), *cert. denied*, 439 U.S. 838 (1978) 17, 18

Standard Oil Co. v. United States, 337 U.S. 293 (1949) 15

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) 15, 19

TABLE OF AUTHORITIES

CASES

Page

United States v. Container Corp. of America, 393 U.S. 333 (1969) 16

United States v. Dairymen, Inc., 660 F.2d 192 (6th Cir. 1981) 19

Statutes

California Evidence Code § 622 12

Clayton Act § 3, 15 U.S.C. § 14 (1914) 15, 18, 19

Sherman Act § 1, 15 U.S.C. § 1 (1890) 14, 16, 18

Sherman Act § 2, 15 U.S.C. § 2 (1890) 14, 17

Supreme Court Rule 15.1 9

Miscellaneous

III P. Areeda & D. Turner, *Antitrust Law* (1978)

¶ 731a 14

¶ 732 .....14, 15

R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, § 4.18 (6th ed. 1986) 12

No. 95-8

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

SICOR LIMITED, ALCO CHEMICALS LTD.,
Petitioner,

VS.

CETUS CORPORATION;
CETUS GENERIC CORPORATION;
BEN VENUE LABORATORIES, INC.;
BEN VENUE GENERIC CORPORATION;
and CETUS-BEN VENUE THERAPEUTICS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

We first state the facts pertinent to the Petition, largely as found by both the district court and the court of appeals,[1]

[1] The district court entered a summary judgment, finding that certain facts were not controverted and thus not in dispute. The court of appeals also found certain of those facts not to be in dispute. This circumstance is akin to the Two Court Rule, that only in exceptional circumstances does this Court undertake to review concurrent findings of fact by two

because the questions purportedly presented are, in fact, not present on this record. We then describe the interlocutory posture of the case, because one of the reasons to deny the Petition is that any question of the kind tendered is highly likely to be rendered moot upon remand to the district court.

I. THE PERTINENT FACTUAL BACKGROUND

A. *Respondent CBVT's* Initial Entry into the United States Generic Doxorubicin Market by Obtaining Bulk Doxorubicin from Petitioners

There are five respondents. One of them, Cetus-Ben Venue Therapeutics, Inc. ("CBVT"), is a partnership formed by two others of them; the remaining two respondents are the corporate parents of those two partners. (App. 4a n.1; App. 34a n.1 and accompanying text.) CBVT is the entity that was involved in the transactions of which petitioners, plaintiffs in the district court, complained. The court of appeals referred to "CBVT" as encompassing all of the parties that are here respondents (App. 8a n.5), and so shall we.

Until June 1988, other parties, referred to below as "Erbamont" or the "Farmitalia Group", held a United States product patent covering a chemical compound that is widely used in cancer treatment, doxorubicin. (App. 3a; App. 33a-34a.) Upon expiry of that product patent, Erbamont still held certain process patents whose term did not expire until nearly three years later. (App. 34a.)

---

courts below. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984); *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949).

Where both of the lower courts found a fact to which we refer, we cite the court of appeals' opinion first and then the district court's order. Where only one citation appears, only one of the courts found the fact to which reference is being made.

Upon expiry of Erbamont's United States product patent, CBVT wished to sell doxorubicin in the United States. To do so, it required a supply of bulk doxorubicin from a manufacturer who had the requisite approval of the United States Food and Drug Administration (the "FDA"). (App. 2a-4a.) CBVT entered into a supply and distribution agreement with petitioner Sicor Limited.[2] CBVT's agreement with Sicor Limited was an exclusive agreement for all of CBVT's requirements, precluding CBVT from acquiring bulk doxorubicin from any other supplier. (App. 4a; App. 34a.) CBVT began its entry into the doxorubicin market in the United States with this supply, making its first sale on May 25, 1989. (App. 5a.)

B. The Shutdown of the Manufacturing Plant Which Was the Source for Petitioners' Supply of Doxorubicin to CBVT

The supply agreement between CBVT and petitioner Sicor Limited was for a three-year term commencing with CBVT's first sale in the United States, hence it was to run through May 24, 1992. (App. 5a.) Two months into that three-year term, the plant which had been manufacturing the doxorubicin to be supplied to CBVT was shut down by authorities in Italy and remained closed for nearly nine months. (App. 6a.) That plant temporarily reopened during 1990 and was again shut down by Italian authorities in September 1990. It has remained closed ever since. (*Id.*)

---

[2] Through amendments, by the time this action was commenced in the district court that agreement had taken the form of two agreements, one between CBVT and petitioner Sicor Limited for the supply of bulk doxorubicin and one between CBVT and petitioner Alco Chemicals, Ltd. for distribution. (App. 3a-5a; App. 34a.) For present purposes, the fact of those different contracts is not material, and we shall simply refer to the existence of a supply agreement between CBVT and Sicor Limited.

After half a year had passed following the second, final, shutdown of the Italian plant, CBVT entered into an alternative supply agreement for bulk doxorubicin with the Farmitalia Group. Their agreement also settled all pending litigation between the Farmitalia Group and CBVT. (App. 8a; App. 35a.)

This suit followed.

C. Neither of the Petitioners Was the Manufacturer of the Bulk Doxorubicin Which Respondents Had Agreed To Purchase from Petitioners.

CBVT's written supply contract referred to a third party, Sicor, S.p.A., as the manufacturer of the bulk doxorubicin which it was buying. It was the manufacturing plant of Sicor, S.p.A. that was shut down by the Italian authorities as stated above. On a motion for summary judgment, the district court interpreted the contract between CBVT and Sicor Limited as requiring that the bulk doxorubicin be manufactured at that plant in Italy owned by Sicor, S.p.A. (App. 39a-42a.) As a result, among other things the district court held that since petitioners could not perform their contract in view of the shutdown of the Sicor, S.p.A. plant in Italy, the contract was canceled as a matter of law and CBVT was entirely free to protect itself by entering into an alternative supply agreement with the Farmitalia Group. (App. 42a.)

The court of appeals held that the supply contract was ambiguous and that it might be interpreted to require only that bulk doxorubicin be supplied in conformance with stated technical specifications, whether or not manufactured by Sicor, S.p.A. at its plant in Italy. (App. 17a-19a.) The court of appeals remanded for, among other things, further proceedings in light of that perceived ambiguity.

In opposing the motion for summary judgment in the district court, petitioners had offered evidence that during

the early period of the final shutdown of the Sicor, S.p.A. plant there had been negotiations between petitioners and a Japanese company, Mercian. According to petitioners, Mercian would have been able to obtain timely FDA approval and thereafter would have been able to supply bulk doxorubicin to CBVT. (App. 7a-8a.) Petitioners asserted that they would have obtained a middleman's commission on such substitute supply if CBVT had not turned instead to the Farmitalia Group. In reversing and remanding, the court of appeals held that there was a triable issue as to whether Sicor was damaged by loss of profit "as an intermediary between third party manufacturers and CBVT, notwithstanding the [Italian] injunction and sequestration order." (App. 23a.)

Thus, both lower courts concurred that neither of these petitioners was ever to be a manufacturer-competitor of Erbamont or the Farmitalia Group. Even before the Italian authorities shut down the Sicor, S.p.A. plant, petitioners were only intermediaries. Even if one conceives that petitioner Sicor Limited could be considered to be a manufacturer-competitor by reason of the fact that it was a subsidiary of Sicor, S.p.A., it was *no longer a manufacturer-competitor* at the pertinent time *when CBVT entered into its alternative supply agreement with Erbamont.* CBVT entered into that alternative supply agreement *precisely because the Sicor Italian supply was no longer available to it.*

Thus, both lower courts concurred that, at most, petitioners were potential intermediaries, hoping to earn a middleman's commission if CBVT turned to another possible alternative source of supply after petitioners' original supplier, Sicor, S.p.A., was shut down.

From that fact alone, the court of appeals held that any harm to competition came from the Italian authorities' shutdown of the Sicor, S.p.A. plant, not from the agreement between CBVT and Farmitalia. (App. 12a-13a.)

II. THE INTERLOCUTORY POSTURE OF THE CASE

Although the court of appeals affirmed the district court's summary disposition of petitioners' antitrust claims, it reversed as to some of petitioners' state law claims and remanded for further proceedings.

Among the issues remanded to the district court by the court of appeals are questions of contract interpretation of the basic CBVT supply agreement with Sicor Limited. If that agreement is interpreted after remand (either at or before trial or upon a subsequent appeal) as the district court had done on summary judgment, then it will have been adjudicated that CBVT had no duty under that contract to purchase doxorubicin from any substitute third party supplier obtained by petitioners once Sicor, S.p.A.'s plant was shut down. That would end any possibility of any kind of actionable damage to petitioners, regardless of their contentions about their antitrust claims. That would return the matter to the same posture as the district court had concluded was correct on the basis of its interpretation of the contract:

> "In this case, plaintiffs can prove no damages from the alleged breach because they have been incapable of competing in the U.S. bulk doxorubicin market since September of 1990. The Sicor, S.p.A. plant was shut down by the Italian government well before CBVT settled its litigation with Erbamont; thus, Sicor could not have suffered any lost profits since it couldn't even manufacture or sell any doxorubicin."

(App. 46a.)

Although the court of appeals found (App. 23a) that summary judgment was inappropriate on the record before it because of the ambiguity that it found in the parties' contract, if CBVT prevails on that question of contract

interpretation on remand the matter will be right back where the district court had said it should be on summary judgment.

SUMMARY OF ARGUMENT

1. None of the questions purportedly presented arises on the present record.

We submit that the shutdown of the Sicor, S.p.A. plant in Italy throughout the relevant time period was the sole and proximate cause of any injury to petitioners. At the very least, the shutdown of the Sicor, S.p.A. plant eliminated petitioners as "manufacturer-competitors" of the Farmitalia Group, even if one would ever have so regarded them in light of the fact that it was Sicor, S.p.A., not either petitioner, that was to be the manufacturer.

As a result, this is not a case in which one manufacturer is foreclosed from a market because a competitive manufacturer exercises exclusionary market power through an exclusive contractual arrangement with a distributor. Each of the questions tendered to this Court in the Petition is founded upon the assumption that it is such a case, but it is not such a case.

For the same reasons, there was no injury in fact, much less antitrust injury, to petitioners by reason of CBVT's obtaining an alternative supply from the Farmitalia Group after Sicor, S.p.A.'s plant was shut down. As both courts below found, petitioners' injury came from the shutdown of the Sicor, S.p.A. plant, not from CBVT's agreement with the Farmitalia Group.

2. Even if the questions stated were presented, none would warrant grant of the writ.

Petitioners claim error, asserting that the court of appeals' decision is at odds with decisions of this Court. The authori-

ties with which the court of appeals decision is said to conflict are long-standing and basic antitrust cases concerning exclusive dealing. The court of appeals did not depart from them, nor does its opinion purport to proclaim principles at odds with any of them. At the very most, petitioners assert that the court of appeals applied settled law in an erroneous way.

The court of appeals' and district court's finding that it was pro-competitive for CBVT to continue its attempt to enter the market by obtaining an alternative source of supply was fully in line with basic rule of reason analysis. CBVT would have had to increase its risk of entry by hoping for an even better arrangement if it had rejected Farmitalia's offer, as well as continuing to run the risk of patent infringement litigation which might have further foreclosed entry. No subtle issue of antitrust law is raised on these facts.

Petitioners have taken out of context the court of appeals' phrase about "making money". The court of appeals did not purport to create a safe haven from antitrust liability for all parties whose motivation is to make money. The court of appeals used that phrase in negating any inference that there had been predatory below-cost pricing.

Nor was any agreement tendered in the district court that provided for a cessation of price competition between manufacturers. If there had been, it would hardly require this Court's grant of *certiorari* to pronounce horizontal price-fixing agreements unlawful. The court of appeals did not proclaim that horizontal price-fixing was lawful.

3. The questions purportedly presented may well be rendered moot by further proceedings after remand to the district court; the interlocutory posture of the case is further reason not to grant the writ.

Moreover, resolution of state law issues which the court of appeals remanded to the district court could render moot all of the antitrust issues purportedly presented now. The case being at an interlocutory stage, it is not ripe for this Court's consideration on discretionary *certiorari* review.

ARGUMENT

I. THE QUESTIONS PURPORTEDLY TENDERED IN THE PETITION ARE NOT PRESENTED ON THIS RECORD.

In accordance with the admonishment in Rule 15.1 of the Rules of this Court, we show that the questions purportedly tendered are not presented on this record.

A. Petitioners Were Not Manufacturer-Competitors because Sicor, S.p.A.'s Plant Was Shut Down during the Entirety of the Relevant Time Period.

We have shown above (pp. 3-5) that both courts below concurred that neither petitioner was a manufacturer-competitor of the Farmitalia Group. Yet that is precisely the pose to which petitioners pretend in their statement of questions presented. This fact alone eliminates any possibility of petitioners recovering by reason of conduct for which a manufacturer-competitor might have standing to recover.

Petitioners' first "question presented" concerns supposed barriers to entry by one manufacturer because a rival manufacturer captured the only viable distributor. But both courts below concurred that petitioners were not a manufacturer-

competitor.[3] Petitioners' second "question presented" assumes that petitioners themselves constitute the "only significant competitor", but both courts below concurred that petitioners were not a manufacturer-competitor at all. Petitioners' third "question presented" refers to supposed cessation of price competition "at the wholesale level", but both courts below concurred that petitioners were not doing business at the wholesale level.

When petitioners argue here that the court of appeals erred, they submit to this Court that the court of appeals failed to take account of petitioners' competition at the very manufacturing level where petitioners have had no competition to offer since the Italian authorities shut down Sicor, S.p.A.'s plant. For instance (Petition at 10), petitioners speak of Erbamont taking over CBVT as an act where Erbamont became "the exclusive supplier to its principal competitor's only distributor"; and to "exclusion of the monopolist's competitor through capture of the competitor's only distributor"; and to "elimination of the only manufacturer which competed on the basis of price"; and (Petition at 12) to "eliminating competitors". Those are simply fictitious sentiments, not in any way supportable on this record.

---

[3] If it were true that CBVT was the only viable distributor and that it was essential to any manufacturer to have a viable distributor, there could never be more than one supplier and it would not matter who that supplier was. As the court of appeals noted (App. 14a n.9):

> "Sicor's allegation that no other finisher-distributor would have been readily available to contract with Sicor or other potential foreign entrants into the American market at the supply level is arguably beside the point, for elimination of Sicor as a competitor would still leave the market essentially where it was before Sicor's entry, *viz.*, with two producers and three finisher-distributors."

B. The Court of Appeals' Reference to "Making Money" Negated Any Inference of Predatory Pricing at a Short Term Loss, and Petitioners Err in Implying that the Court of Appeals Meant To Establish a Safe Harbor Precluding Antitrust Liability.

Petitioners have taken the court of appeals' reference to "making money" out of context. We replace it (App. 13a):

> "Moreover, it is apparent from the materials before us that valid business reasons existed for CBVT's action, *i.e.*, CBVT's reason for buying from Farmitalia was to obtain the product, and Farmitalia's reason for selling that product to CBVT was to make money. In the absence of a showing of selling at a loss or similar conduct explainable only by a motive to reduce or eliminate competition, the appellants' claim is not persuasive."

By no stretch of imagination was the court of appeals creating a safe haven against antitrust liability because a party is motivated to "make money". Any doubt of that is dispelled by the footnote the court of appeals appended at the close of the portion just quoted (App. 13a n.8):

> "While it is true as a general proposition that the existence of valid business reasons motivating a monopolist's conduct is ordinarily a question of fact [citation omitted], the absence of evidence to the contrary in the instant case is dispositive of this issue. *See also Matsushita*, 475 U.S. at 588 ('conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy')."

II. THERE IS A HIGH LIKELIHOOD THAT THE QUESTIONS PURPORTEDLY PRESENTED WILL, IN ANY EVENT, BE RENDERED MOOT UPON REMAND TO THE DISTRICT COURT.

This Court does not ordinarily issue a writ of certiorari from an interlocutory order. *E.g., Brotherhood of L. F. & E. v. Bangor & A. R. C.*, 389 U.S. 327, 328 (1967); R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, § 4.18, p. 224 (6th ed. 1986). The present decision is not only interlocutory, but the questions urged upon this Court are likely to evaporate.

After remand to the district court from the court of appeals, whether before trial, at trial, or upon a subsequent appeal, it is highly likely that it will be determined that petitioners were obliged to provide bulk doxorubicin specifically manufactured at the Sicor, S.p.A. plant in Italy. That will end all aspects of this case, because there will be no possible showing of injury in fact from the supposed antitrust violations.

That result is highly likely because petitioners themselves so averred in their complaint (App. 39a), and such averments are conclusive unless petitioners seek and receive leave to amend in the district court. *E.g., American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).

That result is also highly likely because the contract in issue so states in its own recitals (App. 41a), and such recitals are conclusive as between the parties under the applicable California law. Calif. Evid. Code § 622; *Banco do Brasil, S.A. v. Latian, Inc.*, 234 C.A.3d 973 (1991), *cert. denied*, 504 U.S. 986 (1992).

III. WHEN PETITIONERS WERE UNABLE TO PERFORM THEIR SUPPLY AGREEMENT, IT WAS PRO-COMPETITIVE FOR RESPONDENTS TO MAKE ALTERNATIVE SUPPLY ARRANGEMENTS IN ORDER TO CONTINUE THEIR ENTRY INTO THE MARKET.

CBVT had been a new entrant in the United States doxorubicin business after the product patent covering it expired. CBVT was then utterly dependent upon petitioners for its supply of bulk doxorubicin. When petitioners could no longer provide bulk doxorubicin from the Sicor, S.p.A. plant in Italy, CBVT's continued attempt to enter the market was severely jeopardized. Any alternative source of supply would have been better than leaving CBVT stranded with no source of supply. Any contract of supply in lieu of the one petitioners could no longer perform was pro-competitive in reviving the chance of entry for CBVT. Particularly in the very market petitioners describe, every intendment favored an arrangement that would enhance CBVT's chance of surviving as a new entrant.

If Erbamont had refused to deal with CBVT at all, CBVT would have been at the mercy of a possible arrangement with the Japanese supplier, Mercian, pending necessary approvals from the FDA. In the district court, there were various "scenarios" of such approval offered by petitioners. (App. 7a-8a.) They were all just that, "scenarios" that might or might not eventuate. None of them, however plausible or implausible, was as certain as an assured source of supply from Erbamont, which was already fully approved by the FDA and immediately available.

Both courts below concluded that CBVT's resort to an alternative source of supply from Erbamont was pro-competitive. (App. 12a-13a; App. 51a.) It is fundamental, and has been ever since Justice Brandeis's famous statement in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238

(1918), that only unreasonable restraints are unlawful restraints. *E.g., NCAA v. Board of Regents of Univ. of Okla., supra*, 468 U.S. at 98 n.17 and accompanying text. The antitrust law does not require a party to forego known, procompetitive agreements in order to speculate on the likelihood of obtaining yet another agreement that may prove to be of greater or lesser advantage, if it eventuates at all. That would subject parties to second-guessing of the most pernicious kind. A wrong guess in foregoing an available procompetitive contract would lead to loss of that very procompetitive alternative. The law does not require one to forego a known and socially-desirable "bird in hand" in order to see whether there might later be an even more desirable "bird in the bush".

Nothing in conventional antitrust analysis requires such a result, and nothing in the court of appeals' decision is at odds with conventional antitrust analysis. As the court of appeals noted (App. 11a), it is undisputed that the contract at issue is a vertical supply agreement. Exclusive supply agreements, such as both the petitioners' own agreement with CBVT and CBVT's substitute supply agreement with Erbamont, are evaluated under the rule of reason.[4]

Applying the traditional analysis of requirements contracts to the CBVT-Erbamont contract frames the question as whether competitive manufacturers of doxorubicin are being unreasonably foreclosed from their ability to reach health care users of doxorubicin because of the CBVT contract with Erbamont. III P. Areeda & D. Turner, *Anti-*

---

[4] Petitioners included claims under both Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Exclusive dealing contracts being by their nature "exclusionary," analysis is the same whether conducted under the rule of reason for a Section 1 claim or whether the claim be placed under Section 2 simply because the supplier happens to have monopoly power. III P. Areeda & D. Turner, *Antitrust Law*, ¶ 731a, pp. 247-48 (1978).

trust Law, ¶ 732 (1978). *Cf., Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), both of which were decided under Section 3 of the Clayton Act, whose prohibition is broader than the Sherman Act provisions petitioners have invoked. Petitioners have not been such a competitor at any time since the Sicor, S.p.A. plant was shut down. Nor do petitioners suggest any analysis of how any other existing manufacturer has been foreclosed from the health care market by reason of CBVT's contract with Erbamont. Indeed, if, as petitioners suggest, the effect of the Erbamont-CBVT contract were to keep prices up, that would simply add incentive to entry for any other manufacturers that may exist. Furthermore, to the extent that CBVT provides a particularly favorable channel of distribution, in fully exploiting its own capabilities in finishing and marketing doxorubicin in competition with Erbamont it is providing the very efficiency in distribution to health care users of these products that the antitrust laws are intended to achieve from competition.

Petitioners' submissions would make it per se unlawful to have dual distribution arrangements, *i.e.*, agreements where a manufacturer competes with its distributor. Such agreements are a commonplace in our economy, are frequently pro-competitive, and are certainly not *per se* unlawful. *See, e.g., Illinois Corporate Travel v. American Airlines*, 889 F.2d 751, 753 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990):

> "Dual distribution therefore does not subject to the per se ban a practice that would be lawful if the manufacturer were not selling direct to customers; antitrust laws encourage rather than forbid this extra competition."

The only other antitrust principle which petitioners claim to have been established by this Court and ignored by the court of appeals below is found in their reference (Petition

23) to *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). *Container Corp.* considered agreements of competitors to exchange price information without an accompanying agreement to adhere to a price schedule. 393 U.S. at 334. The defendants in *Container Corp.* had urged that the Court ought not infer a price-stabilizing agreement because prices had been declining. Justice Douglas, writing for the majority of a divided Court, said that stabilizing prices as well as raising them is within the ban of Section 1 of the Sherman Act. That reference to stabilizing prices is what petitioners quote. (Petition 23.) The quotation had nothing to do with exclusive dealing agreements. *Container Corp.* had nothing to do with exclusive dealing analysis. Nothing in *Container Corp.* establishes a *per se* rule that all exclusive dealing contracts are unlawful if they are accompanied by "price stabilization".

Nor does the court of appeals' decision create a conflict between the circuits. Petitioners' references to four cases from other courts of appeals are all wide of the mark.

Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369 (10th Cir. 1979), involved reversal of the district court's dismissal on the pleadings for failure to state a claim. The plaintiff had been a distributor who supplied certain goods to Burger King franchisees. The court of appeals held that its complaint was susceptible of interpretation to claim that its distribution contract had been terminated at the behest of a competitive distributor (*id.* at 1375):

> "Perhaps Burger King, or its subsidiary Davmor, could supply all logoed paper cups and other items to its outlets and franchisees without violation of the antitrust laws. But once independent businesses are employed in its distribution structure, it cannot accede to the demands of one competitor-distributor to lessen competition in that entity's market. [Citation omitted.]"

The court thus held that it was improper to cut off one distributor at the behest of its competitor. Such distributor-cutoff cases are far wide of the analysis of exclusive dealing agreements as such and offer no guidance to proper analysis of the CBVT agreement with Sicor Limited. The court of appeals' decision below is in no way at odds with the *Burger King* decision.

Petitioners' argument (Petition 16-17) that the court of appeals decision below is in conflict with *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3rd Cir.), *cert. denied*, 439 U.S. 838 (1978), is, with all due respect, unintelligible. *SmithKline* had nothing whatever to do with exclusive dealing agreements or with any other principle of antitrust analysis to which petitioners make even tangential reference. In *SmithKline*, the Third Circuit addressed a question of product market definition in a Section 2 case.[5] Having agreed with the district court's definition of the product market, the court then considered whether the defendant had monopoly power and whether its pricing program, which had admittedly been adopted after expiry of its product patent, constituted monopolization under Section 2. In referring to the defendant's market power in the properly-defined product market, the court noted that the fact that the defendant had *obtained* that position when it held a valid product patent did not insulate it from Section 2 liability for conduct that was allegedly improper in *maintaining* its monopoly power after expiry of the product patent. The court then held that *maintaining* its monopoly power *after* expiry of the product patent through an improper pricing

---

[5] The court so described the question before it at the outset of its opinion (575 F.2d at 1057-58):

> "The major question for decision is whether the district court in a non-jury trial erred in defining the relevant product market in a proceeding . . . ."

Its opinion centered on that question. *Id.* at 1062-65.

plan constituted unlawful monopolization. 575 F.2d at 1065. There is nothing whatever in the defendant's pricing plan there at issue which is remotely related to any question about exclusive dealing in the case at Bar. There was nothing analyzed by the Third Circuit in *SmithKline* which could inform, much less conflict with, anything decided by the court of appeals below.

Petitioners also assert a conflict between the court of appeals' decision below and *Dictograph Products v. Federal Trade Comm'n*, 217 F.2d 821, 827 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955).[6] Petitioners say (Petition 18) that the market shares referred to in *Dictograph* should control disposition of the present case. Market share of a manufacturer is not the relevant inquiry when one is considering a case in which the *distributor* is said to be the potential bottleneck in the channels of distribution. In the case at Bar, the supposed restraint of trade is said to lie in the uniqueness of CBVT, the *distributor*. That calls for examination of market power, or potential bottleneck effects, at the distributor level, not at the manufacturer level.

Dictograph considered an entirely different situation. There were in that case many competitive suppliers of hearing aids, and they were held to have been disadvantaged by reason of defendant Dictograph's agreements with nu-

---

[6] Petitioners pay lip service to the fact that *Dictograph* was a decision about market effect under the lower standard of Section 3 of the Clayton Act (Petition 18), but discuss the case as if it were in conflict with the court of appeals' decision here under Section 1 of the Sherman Act. The court in *Dictograph* emphasized (217 F.2d at 826-27) the legislative history of Section 3 of the Clayton Act and Congress's evident desire to avoid rule of reason analysis under the Sherman Act. Moreover, *Dictograph* involved exclusive dealing agreements which had numerous terms in addition to a requirement that the distributor take all of its requirements from Dictograph, including a noncompetition covenant by the distributor for a period after termination of the agreement, which the court emphasized. 217 F.2d at 823-24.

merous distributors. That is the opposite of the situation here. CBVT did not have numerous competitive suppliers to whom to turn when the Sicor, S.p.A. plant stayed shut down for over half a year. When CBVT made its agreement with Erbamont, it had lost the only supplier that had theretofore been available other than Erbamont. Whether or not Mercian would have materialized was problematic, to one degree or another. The references in *Dictograph* to the number of alternative suppliers highlights a controlling difference between it and this case.

Nor did *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981), another Clayton Section 3 case, establish any principles in conflict with the decision of the court of appeals below. Dairymen did not even say what petitioners claim for it. In *Dairymen*, the court considered the extent of immunity for price-setting by agricultural cooperatives under the Capper-Volstead Act, holding that there would be no immunity for an attempt to monopolize. The court's statement that the district court had set "too high a burden" on the Government, which the Petition quotes (Petition 18), was not made in conjunction with the court's quotation from *Tampa Electric*, as petitioners imply to this Court. Petitioners put both quotations in the same sentence in their petition to this Court and then cite the case "*Id.* at 194-95." (Petition 18-19.) That is an inaccurate citation. The court in *Dairymen* made the "too high" statement relative to the question whether specific intent in an attempt to monopolize case required a showing of predatory pricing. Four paragraphs later, in a footnote to a different analysis, the court in *Dairymen* quoted from *Tampa Electric*. It is those two, entirely disjointed statements, which petitioners join in their argument here. *Dairymen* has nothing to do with the analysis in the present case.

CONCLUSION

Respondents respectfully submit that the Petition be denied.

Respectfully submitted,

CHARLES B. COHLER
Counsel of Record
for All Respondents

July 31, 1995
San Francisco, California